ORIGINAL

No. 99-5153

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CORNELL JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, upon the revocation of petitioner's supervised release, the Ex Post Facto Clause precluded the district court from ordering petitioner, under 18 U.S.C. 3583(h) (Supp. 1995), to serve a term of reimprisonment followed by a renewed term of supervised release.

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OPINION BELOW

The order of the court of appeals (Pet. App. A1-A2) is unpublished, but may be found at 1999 WL 282679, and the judgment will be noted at 181 F.3d 105 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1999. Pet. App. A1. The petition for a writ of certiorari was filed on July 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After his supervised release was revoked by the United States District Court for the Eastern District of Tennessee, petitioner was ordered to serve 18 months' reimprisonment, to be followed by 12 months' renewed supervised release. Pet. App. A1. The court of appeals affirmed.

1. After a guilty plea, petitioner was convicted on March 8, 1994, for conspiring to defraud, produce, use, and traffic in one or more counterfeit access devices, in violation of 18 U.S.C. 1029(b)(2), which is a Class D felony.[1] Pet. App. A1; Gov't C.A. Br. 3. Petitioner was sentenced to 25 months' imprisonment, to be followed by three years' supervised release. Pet. App. A1. After he was released from imprisonment and began to serve his term of supervised release, petitioner left the judicial district without permission and committed various state-law offenses in Virginia. Ibid. After a hearing at which petitioner admitted violations of his supervised release, the district court revoked petitioner's supervised release and ordered him reincarcerated for 18 months to be followed by a renewed term of 12 months' supervised release. Ibid.

2. At the time of petitioner's original offense,

[1] Because petitioner's offense of conspiring to commit (but not personally committing) the access-device crime is punishable, under Sections 1029(b)(2) and (c)(1)(A)(i), by up to five years' imprisonment, the offense is a Class D felony under 18 U.S.C. 3559(a)(4).

violations of supervised release were governed by 18 U.S.C. 3583(e) (1988 ed., Supp. IV 1992). That provision authorized the district courts, upon an offender's violation of his supervised release, to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3) (1988 ed., Supp. IV 1992). The courts of appeals reached conflicting views on whether that provision authorized a district court to order an offender who violated supervised release to serve a combined term of reimprisonment and renewed supervised release, or whether the court was limited to ordering such an offender to serve a term of reimprisonment.[2]

Effective September 13, 1994 -- after petitioner committed the underlying offense for which he was imprisoned, but before he

[2] The First and Eighth Circuits had ruled that sentencing courts had the power to order offenders to serve terms of reimprisonment to be followed by renewed supervised release, but other circuits disagreed and found no authority to order offenders to serve a renewed term of supervised release. Compare United States v. O'Neil, 11 F.3d 292, 293 (1st Cir. 1993), and United States v. Schrader, 973 F.2d 623, 625 (8th Cir. 1992), with United States v. Koehler, 973 F.2d 132, 134-136 (2d Cir. 1992); United States v. Malesic, 18 F.3d 205, 206 (3d Cir. 1994); United States v. Cooper, 962 F.2d 339, 341-342 (4th Cir. 1992); United States v. Holmes, 954 F.2d 270, 272-273 (5th Cir. 1992); United States v. Truss, 4 F.3d 437, 441 (6th Cir. 1993); United States v. McGee, 981 F.2d 271, 274-276 (7th Cir. 1992); United States v. Behnezhad, 907 F.2d 896, 898-899 (9th Cir. 1990); United States v. Rockwell, 984 F.2d 1112, 1116-1117 (10th Cir.), cert. denied, 508 U.S. 966 (1993); United States v. Tatum, 998 F.2d 893, 895-896 (11th Cir. 1993).

violated the terms of his supervised release -- Congress enacted 18 U.S.C. 3583(h). Pub. L. No. 103-322, Tit. XI, § 110505(3), 108 Stat. 2017. Section 3583(h) made clear that, when a defendant's term of supervised release is revoked and he is ordered to serve a term of reimprisonment, the district court may also order the offender to serve a term of supervised release after his release from reimprisonment. Section 3583(h) expressly authorizes a new term of supervised release, as long as the term of reimprisonment is less than the maximum authorized upon revocation, and as long as the combination of the period of reimprisonment and the period of supervised release does not exceed in duration the maximum term of supervised release authorized for the original offense. 18 U.S.C. 3583(h). For these purposes, the offender is not entitled to any credit for the time he spent on supervised release before it was revoked. See 18 U.S.C. 3583(e)(3) and (h).[3]

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[3] Section 3583(h) provides in full:

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

Section 3583(e)(3) provides that, upon finding a violation of a condition of supervised release, a district court may

> revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release * * * without credit for time previously served on postrelease supervision, * * * except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense was a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.

3. Petitioner appealed the revocation of his supervised release, contending that the application of Section 3583(h) to his case violated the Ex Post Facto Clause. The court of appeals affirmed in an unpublished order. Pet. App. A1-A2. Relying on circuit precedent, United States v. Abbington, 144 F.3d 1003, 1005 (6th Cir.), cert. denied, 119 S. Ct. 344 (1998); United States v. Page, 131 F.3d 1173 (6th Cir.), cert. denied, 119 S. Ct. 77 (1998), the court held that the violation of a condition of supervised release is a separate prohibited act, and that punishment for that violation does not implicate the Ex Post Facto Clause if the violation occurred after the amendment to Section 3583(h). Pet. App. A2.

ARGUMENT

Petitioner urges (Pet. 5-10) this Court to decide whether, in a case in which a defendant committed his underlying offense before the enactment of 18 U.S.C. 3583(h), a court may, upon revocation of supervised release, lawfully impose under that

provision a renewed term of supervised release after reimprisonment. The Court has recently denied review on the same issue in nine cases, including five earlier cases that were decided in the circuit in which this case arose (and on which the lower court relied in this case). See Ledford v. United States, 119 S. Ct. 1360 (1999); Smith v. United States, 119 S. Ct. 1117 (1999); Abbington v. United States, 119 S. Ct. 344 (1998); Grubbs v. United States, 119 S. Ct. 80 (1998); Page v. United States, 119 S. Ct. 77 (1998); see also Shorty v. United States, 119 S.Ct. 2024 (1999); Withers v. United States, 119 S. Ct. 79 (1998); Brown v. United States, 522 U.S. 1120 (1998); Brady v. United States, 519 U.S. 1094 (1997).[4] There is no basis in this case for a different result. Petitioner may in fact have benefitted from the application of Section 3583(h) to his case because, on the revocation of his supervised release, the district court ordered him to serve a term of reimprisonment that was shorter than the maximum term that he could have been ordered to serve under prior law. In any event, the issue has only limited prospective significance. This Court's review is therefore not warranted.

1. An ex post facto issue would arise in a case like this by virtue of the application of Section 3583(h) only if that enactment changed the law in a way that was onerous to

[4] The same issue is also presented in Davis v. United States, petition for cert. pending, No. 98-9402.

petitioner. The court of appeals decided this case (and the prior ones, like Abbington, on which it relied) on the assumption that Section 3583(h) changed the law because it took the view that, before Section 3583(h) was enacted, the law did not permit a court, upon revocation of a term of supervised release, to impose a term of imprisonment to be followed by a renewed term of supervised release. See United States v. Truss, 4 F.3d 437, 441 (6th Cir. 1993). That understanding of the prior law is incorrect. Before Section 3583(h) was enacted, a district court was authorized to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3) (1988 ed., Supp. IV 1992). Thus, a district court, upon revoking supervised release, was authorized to impose a term of reimprisonment equal in length to the term of supervised release originally imposed. That statutory power is most naturally understood to include the lesser power to impose a punishment that combines, for a period of equal or lesser duration, both prison and supervised release. See United States v. Schrader, 973 F.2d 623, 625 (8th Cir. 1992); accord United States v. O'Neil, 11 F.3d 292, 296-297 (1st Cir. 1993).

Before Section 3583(h) was enacted, some courts of appeals interpreted Section 3583(e) to prohibit a district court from including a period of supervised release following

reimprisonment. See note 2, supra. This Court never decided that issue. The enactment of Section 3583(h) resolved the disagreement among the circuits on that question by expressly empowering sentencing courts, upon revocation of supervised release, to impose a combined term of imprisonment and renewed supervised release. As we have explained, subsection (h) reaffirmed a power that already existed under prior law. An ex post facto problem, therefore, could not arise solely from the fact that the district court ordered petitioner to serve a new term of supervised release following his term of reimprisonment.

2. Although petitioner challenges the sentencing court's reliance on Section 3583(h), he may have benefitted from its application to his case. Under the statutory provisions governing supervised release at the time of petitioner's offense, a district court was authorized to impose two years' reimprisonment following revocation of supervised release because petitioner's underlying credit-card conspiracy offense was a Class D felony. See note 1, supra; 18 U.S.C. 3583(e)(3) (providing for up to two years' reimprisonment after revocation of supervised release when the underlying offense is a Class D felony). In the circuits that had denied courts the power to reimpose supervised release after the term of reimprisonment, the new law gave the district court the flexibility to order offenders to serve a lesser term of reimprisonment, followed by a period of supervised release. After his original term of

supervised release was revoked, petitioner was ordered to serve only 18 months' reimprisonment, followed by further supervised release. The option afforded under Section 3583(h) for the district court to order offenders like petitioner to serve shorter terms in prison to be followed by supervised release, rather than potentially lengthier terms of prison alone, reduces any ex post facto concerns in the application of Section 3583(h). Cf. Dobbert v. Florida, 432 U.S. 282, 292, 296 (1977) (rejecting contention that change from jury-sentencing to judge-sentencing procedure was an ex post facto violation because "the changes in the law are * * * on the whole ameliorative," and "the totality of the procedural changes wrought by the new statute * * * did not work an onerous application of an ex post facto change in the law"); United States v. Withers, 128 F.3d 1167, 1172 (7th Cir. 1997) (relying on Dobbert in observing that Section 3583(h) has an "ameliorative" effect in enabling district court to impose relatively shorter terms of reimprisonment "because of its ability to impose a renewed term of supervised release following" the term of reimprisonment rather than simply imposing a longer prison term), cert. denied, 119 S. Ct. 79 (1998).[5]

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[5] The court in Withers overruled United States v. Beals, 87 F.3d 854 (7th Cir. 1996), to which petitioner refers (Pet. 6). The panel in Beals believed that the possibility of sequential revocations of supervised release and successive terms of reimprisonment under Section 3583(h) created a disadvantage for purposes of the ex post facto analysis. As Withers correctly recognized, however, such speculative future consequences, preventable by the defendant, do not rise to the level of

3. Petitioner argues that the decision below conflicts with decisions of other circuits that have concluded that the application of Section 3583(h) to offenders whose offenses were committed before the enactment of that statute violated the Ex Post Facto Clause. See Pet. 8-9. There is a divergence of views between the decision below and the decisions of other circuits. Compare Pet. App. A1-A2 (decision below) and United States v. Withers, 128 F.3d 1167 (7th Cir. 1997), cert. denied, 119 S. Ct. 79 (1998), with United States v. Lominac, 144 F.3d 1003 (4th Cir. 1998), United States v. Dozier, 119 F.3d 239 (3d Cir. 1997), and United States v. Collins, 118 F.3d 1394 (9th Cir. 1997).[6] The issue is of limited prospective significance, however, because it has relevance only to those offenders who committed their

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increased punishment under California Department of Corrections v. Morales, 514 U.S. 499 (1995). See Withers, 128 F.3d at 1171-1172.

[6] Petitioner also suggests (Pet. 8-9) that the decision below conflicts with other decisions of the Second, Fourth, and Ninth Circuits concerning the ex post facto significance of the revocation of supervised release and imposition of terms of reimprisonment. Those decisions, however, concerned the application of 18 U.S.C. 3583(g) (1988), which at one time required, following revocation of supervised release for certain reasons, the imposition of mandatory minimum terms of reimprisonment of one-third of the term of supervised release. Section 3583(g) was completely revised in 1994, see Pub. L. No. 103-322, tit. XI, § 110505, 109 Stat. 2016, and, although it still requires revocation of supervised release in certain circumstances, it no longer requires the mandatory minimum reimprisonment term of one-third the term of supervised release. See 18 U.S.C. 3583(g) (1994 & Supp. III 1997). The decisions addressing the ex post facto implications of former Section 3583(g), therefore, have no continuing significance.

underlying offenses between November 1, 1987 (when the use of supervised release commenced under the Sentencing Guidelines), and September 13, 1994 (when Section 3583(h) became effective). The number of offenders potentially affected by the question presented here is therefore fixed. As we have also noted (page 6, supra), this Court already has denied review of the same question several times.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 98-5664

IN THE UNITED STATES SUPREME COURT

OCTOBER 1998 TERM

UNITED STATES OF AMERICA,

Respondent,

V.

CORNELL JOHNSON,

Petitioner.

MOTION TO PROCEED IN FORMA PAUPERIS

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IN THE SUPREME COURT OF THE UNITED STATES

JOHNSON, CORNELL
Petitioner

vs.

USA

No. 99-5153

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 17th day of September 1999.

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September 17, 1999

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